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28 CFR Ch. I (7–1–14 Edition)

(1) The closure of part of a judicial proceeding where necessary to protect national security information or classified documents; or

(2) *In camera* inspection, consideration or sealing of documents, including documents provided to the Government under a promise of confidentiality, where permitted by statute, rule of evidence or privilege; or

(3) Grand jury proceedings or proceedings ancillary thereto; or

(4) Conferences traditionally held at the bench or in chambers during the course of an open proceeding; or

(5) The closure of judicial proceedings pursuant to 18 U.S.C. 3509 (d) and (e) for the protection of child victims or child witnesses.

(f) Because of the vital public interest in open judicial proceedings, the records of any proceeding closed pursuant to this section, and still sealed 60 days after termination of the proceeding, shall be reviewed to determine if the reasons for closure are still applicable. If they are not, an appropriate motion will be made to have the records unsealed. If the reasons for closure are still applicable after 60 days, this review is to be repeated every 60 days until such time as the records are unsealed. Compliance with this section will be monitored by the Criminal Division.

(g) The principles set forth in this section are intended to provide guidance to attorneys for the Government and are not intended to create or recognize any legally enforceable right in any person.

[Order No. 914-80, 45 FR 69214, Oct. 20, 1980, as amended by Order No. 1031-83, 48 FR 49509, Oct. 26, 1983; Order No. 1115-85, 50 FR 51677, Dec. 19, 1985; Order No. 1507-91, 56 FR 32327, July 16, 1991]

§ 50.10 Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media.

(a) *Statement of principles.* (1) Because freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news, the Department's policy is intended to provide protection to members of the news media from certain law enforcement tools, whether crimi-

nal or civil, that might unreasonably impair ordinary newsgathering activities. The policy is not intended to extend special protections to members of the news media who are the focus of criminal investigations for conduct not based on, or within the scope of, ordinary newsgathering activities.

(2) In determining whether to seek information from, or records of, members of the news media, the approach in every instance must be to strike the proper balance among several vital interests: protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society.

(3) The Department views the use of certain law enforcement tools, including subpoenas, court orders issued pursuant to 18 U.S.C. 2703(d) or 3123, and search warrants to seek information from, or records of, non-consenting members of the news media as extraordinary measures, not standard investigatory practices. Subpoenas or court orders issued pursuant to 18 U.S.C. 2703(d) or 3123, in particular, may be used, after authorization by the Attorney General, or by another senior official in accordance with the exceptions set forth in paragraph (c)(3) of this section, only to obtain information from, or records of, members of the news media when the information sought is essential to a successful investigation, prosecution, or litigation; after all reasonable alternative attempts have been made to obtain the information from alternative sources; and after negotiations with the affected member of the news media have been pursued, unless the Attorney General determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(4) When the Attorney General has authorized the use of a subpoena, court order issued pursuant to 18 U.S.C. 2703(d) or 3123, or warrant to obtain from a third party communications

records or business records of a member of the news media, the affected member of the news media shall be given reasonable and timely notice of the Attorney General's determination before the use of the subpoena, court order, or warrant, unless the Attorney General determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(b) *Scope.*—(1) *Covered individuals and entities.* (i) The policy governs the use of certain law enforcement tools to obtain information from, or records of, members of the news media.

(ii) The protections of the policy do not extend to any individual or entity who is or is reasonably likely to be—

(A) A foreign power or agent of a foreign power, as those terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(B) A member or affiliate of a foreign terrorist organization designated under section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a));

(C) Designated as a Specially Designated Global Terrorist by the Department of the Treasury under Executive Order No. 13224 of September 23, 2001 (66 FR 49079);

(D) A specially designated terrorist as that term is defined in 31 CFR 595.311 (or any successor thereto);

(E) A terrorist organization as that term is defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi));

(F) Committing or attempting to commit a crime of terrorism, as that offense is described in 18 U.S.C. 2331(5) or 2332b(g)(5);

(G) Committing or attempting the crime of providing material support or resources, as that term is defined in 18 U.S.C. 2339A(b)(1), to a terrorist organization; or

(H) Aiding, abetting, or conspiring in illegal activity with a person or organization described in paragraphs (b)(1)(ii)(A) through (G) of this section.

(2) *Covered law enforcement tools and records.* (i) The policy governs the use

by law enforcement authorities of subpoenas or, in civil matters, other similar compulsory process such as a civil investigative demand (collectively “subpoenas”) to obtain information from members of the news media, including documents, testimony, and other materials; and the use by law enforcement authorities of subpoenas, or court orders issued pursuant to 18 U.S.C. 2703(d) (“2703(d) order”) or 18 U.S.C. 3123 (“3123 order”), to obtain from third parties “communications records” or “business records” of members of the news media.

(ii) The policy also governs applications for warrants to search the premises or property of members of the news media, pursuant to Federal Rule of Criminal Procedure 41; or to obtain from third-party “communication service providers” the communications records of members of the news media, pursuant to 18 U.S.C. 2703(a) and (b).

(3) *Definitions.* (i)(A) “Communications records” include the contents of electronic communications as well as source and destination information associated with communications, such as email transaction logs and local and long distance telephone connection records, stored or transmitted by a third-party communication service provider with which the member of the news media has a contractual relationship.

(B) Communications records do not include information described in 18 U.S.C. 2703(c)(2)(A), (B), (D), (E), and (F).

(ii) A “communication service provider” is a provider of an electronic communication service or remote computing service as defined, respectively, in 18 U.S.C. 2510(15) and 18 U.S.C. 2711(2).

(iii)(A) “Business records” include records of the activities, including the financial transactions, of a member of the news media related to the coverage, investigation, or reporting of news, which records are generated or maintained by a third party with which the member of the news media has a contractual relationship. Business records are limited to those that could provide information about the newsgathering techniques or sources of a member of the news media.

(B) Business records do not include records unrelated to ordinary newsgathering activities, such as those related to the purely commercial, financial, administrative, or technical, operations of a news media entity.

(C) Business records do not include records that are created or maintained either by the government or by a contractor on behalf of the government.

(c) *Issuing subpoenas to members of the news media, or using subpoenas or court orders issued pursuant to 18 U.S.C. 2703(d) or 3123 to obtain from third parties communications records or business records of a member of the news media.* (1) Except as set forth in paragraph (c)(3) of this section, members of the Department must obtain the authorization of the Attorney General to issue a subpoena to a member of the news media; or to use a subpoena, 2703(d) order, or 3123 order to obtain from a third party communications records or business records of a member of the news media.

(2) Requests for the authorization of the Attorney General for the issuance of a subpoena to a member of the news media, or to use a subpoena, 2703(d) order, or 3123 order to obtain communications records or business records of a member of the news media, must personally be endorsed by the United States Attorney or Assistant Attorney General responsible for the matter.

(3) *Exceptions to the Attorney General authorization requirement.* (i)(A) A United States Attorney or Assistant Attorney General responsible for the matter may authorize the issuance of a subpoena to a member of the news media (e.g., for documents, video or audio recordings, testimony, or other materials) if the member of the news media expressly agrees to provide the requested information in response to a subpoena. This exception applies, but is not limited, to both published and unpublished materials and aired and unaired recordings.

(B) In the case of an authorization under paragraph (c)(3)(i)(A) of this section, the United States Attorney or Assistant Attorney General responsible for the matter shall provide notice to the Director of the Criminal Division's Office of Enforcement Operations within 10 business days of the authorization of the issuance of the subpoena.

(ii) In light of the intent of the policy to protect freedom of the press, ordinary newsgathering activities, and confidential news media sources, authorization of the Attorney General will not be required of members of the Department in the following circumstances:

(A) To issue subpoenas to news media entities for purely commercial, financial, administrative, technical, or other information unrelated to ordinary newsgathering activities; or for information or records relating to personnel not involved in ordinary newsgathering activities.

(B) To issue subpoenas to members of the news media for information related to public comments, messages, or postings by readers, viewers, customers, or subscribers, over which the member of the news media does not exercise editorial control prior to publication.

(C) To use subpoenas to obtain information from, or to use subpoenas, 2703(d) orders, or 3123 orders to obtain communications records or business records of, members of the news media who may be perpetrators or victims of, or witnesses to, crimes or other events, when such status (as a perpetrator, victim, or witness) is not based on, or within the scope of, ordinary newsgathering activities.

(iii) In the circumstances identified in paragraphs (c)(3)(ii)(A) through (C) of this section, the United States Attorney or Assistant Attorney General responsible for the matter must—

(A) Authorize the use of the subpoena or court order;

(B) Consult with the Criminal Division regarding appropriate review and safeguarding protocols; and

(C) Provide a copy of the subpoena or court order to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations within 10 business days of the authorization.

(4) *Considerations for the Attorney General in determining whether to authorize the issuance of a subpoena to a member of the news media.* (i)(A) In criminal matters, there should be reasonable grounds to believe, based on public information, or information from non-media sources, that a crime has occurred, and that the information

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sought is essential to a successful investigation or prosecution. The subpoena should not be used to obtain peripheral, nonessential, or speculative information.

(B) In civil matters, there should be reasonable grounds to believe, based on public information or information from non-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(ii) The government should have made all reasonable attempts to obtain the information from alternative, non-media sources.

(iii)(A) The government should have pursued negotiations with the affected member of the news media, unless the Attorney General determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. Where the nature of the investigation permits, the government should have explained to the member of the news media the government's needs in a particular investigation or prosecution, as well as its willingness to address the concerns of the member of the news media.

(B) The obligation to pursue negotiations with the affected member of the news media, unless excused by the Attorney General, is not intended to conflict with the requirement that members of the Department secure authorization from the Attorney General to question a member of the news media as required in paragraph (f)(1) of this section. Accordingly, members of the Department do not need to secure authorization from the Attorney General to pursue negotiations.

(iv) The proposed subpoena generally should be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.

(v) In investigations of unauthorized disclosures of national defense infor-

mation or of classified information, where the Director of National Intelligence, after consultation with the relevant Department or agency head(s), certifies to the Attorney General the significance of the harm raised by the unauthorized disclosure and that the information disclosed was properly classified and reaffirms the intelligence community's continued support for the investigation and prosecution, the Attorney General may authorize the Department, in such investigations, to issue subpoenas to members of the news media. The certification will be sought not more than 30 days prior to the submission of the approval request to the Attorney General.

(vi) Requests should be treated with care to avoid interference with ordinary newsgathering activities or claims of harassment.

(vii) The proposed subpoena should be narrowly drawn. It should be directed at material and relevant information regarding a limited subject matter, should cover a reasonably limited period of time, should avoid requiring production of a large volume of material, and should give reasonable and timely notice of the demand.

(5) *Considerations for the Attorney General in determining whether to authorize the use of a subpoena, 2703(d) order, or 3123 order to obtain from third parties the communications records or business records of a member of the news media.*

(i)(A) In criminal matters, there should be reasonable grounds to believe, based on public information, or information from non-media sources, that a crime has been committed, and that the information sought is essential to the successful investigation or prosecution of that crime. The subpoena or court order should not be used to obtain peripheral, nonessential, or speculative information.

(B) In civil matters, there should be reasonable grounds to believe, based on public information, or information from non-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of substantial importance. The subpoena should not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(ii) The use of a subpoena or court order to obtain from a third party communications records or business records of a member of the news media should be pursued only after the government has made all reasonable attempts to obtain the information from alternative sources.

(iii)(A) The government should have pursued negotiations with the affected member of the news media, unless the Attorney General determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(B) The obligation to pursue negotiations with the affected member of the news media, unless excused by the Attorney General, is not intended to conflict with the requirement that members of the Department secure authorization from the Attorney General to question a member of the news media as set forth in paragraph (f)(1) of this section. Accordingly, members of the Department do not need to secure authorization from the Attorney General to pursue negotiations.

(iv) In investigations of unauthorized disclosures of national defense information or of classified information, where the Director of National Intelligence, after consultation with the relevant Department or agency head(s), certifies to the Attorney General the significance of the harm raised by the unauthorized disclosure and that the information disclosed was properly classified and reaffirms the intelligence community's continued support for the investigation and prosecution, the Attorney General may authorize the Department, in such investigations, to use subpoenas or court orders issued pursuant to 18 U.S.C. 2703(d) or 3123 to obtain communications records or business records of a member of the news media. The certification will be sought not more than 30 days prior to the submission of the approval request to the Attorney General.

(v) The proposed subpoena or court order should be narrowly drawn. It should be directed at material and relevant information regarding a limited subject matter, should cover a reason-

ably limited period of time, and should avoid requiring production of a large volume of material.

(vi) If appropriate, investigators should propose to use search protocols designed to minimize intrusion into potentially protected materials or newsgathering activities unrelated to the investigation, including but not limited to keyword searches (for electronic searches) and filter teams (reviewing teams separate from the prosecution and investigative teams).

(d) *Applying for warrants to search the premises, property, or communications records of members of the news media.* (1) Except as set forth in paragraph (d)(4) of this section, members of the Department must obtain the authorization of the Attorney General to apply for a warrant to search the premises, property, or communications records of a member of the news media.

(2) All requests for authorization of the Attorney General to apply for a warrant to search the premises, property, or communications records of a member of the news media must personally be endorsed by the United States Attorney or Assistant Attorney General responsible for the matter.

(3) In determining whether to authorize an application for a warrant to search the premises, property, or contents of communications records of a member of the news media, the Attorney General should take into account the considerations identified in paragraph (c)(5) of this section.

(4) Members of the Department may apply for a warrant to obtain work product materials or other documentary materials of a member of the news media pursuant to the "suspect exception" of the Privacy Protection Act ("PPA suspect exception"), 42 U.S.C. 2000aa(a)(1) and (b)(1), only when the member of the news media is a focus of a criminal investigation for conduct not based on, or within the scope of, ordinary newsgathering activities. In such instances, members of the Department must secure authorization from a Deputy Assistant Attorney General for the Criminal Division.

(5) Members of the Department should not be authorized to apply for a warrant to obtain work product materials or other documentary materials

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of a member of the news media under the PPA suspect exception, 42 U.S.C. 2000aa(a)(1) & (b)(1), if the sole purpose is to further the investigation of a person other than the member of the news media.

(6) A Deputy Assistant Attorney General for the Criminal Division may authorize, under an applicable PPA exception, an application for a warrant to search the premises, property, or communications records of an individual other than a member of the news media, but who is reasonably believed to have “a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.” 42 U.S.C. 2000aa(a) and (b).

(7) In executing a warrant authorized by the Attorney General or by a Deputy Assistant Attorney General for the Criminal Division investigators should use search protocols designed to minimize intrusion into potentially protected materials or newsgathering activities unrelated to the investigation, including but not limited to keyword searches (for electronic searches) and filter teams (reviewing teams separate from the prosecution and investigative teams).

(e) *Notice to affected member of the news media.* (1)(i) When the Attorney General has authorized the use of a subpoena, court order, or warrant to obtain from a third party communications records or business records of a member of the news media, the affected member of the news media shall be given reasonable and timely notice of the Attorney General’s determination before the use of the subpoena, court order, or warrant, unless the Attorney General determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.

(ii) The mere possibility that notice to the affected member of the news media, and potential judicial review, might delay the investigation is not, on its own, a compelling reason to delay notice.

(2) When the Attorney General has authorized the use of a subpoena, court

order, or warrant to obtain communications records or business records of a member of the news media, and the affected member of the news media has not been given notice of the Attorney General’s determination before the use of the subpoena, court order, or warrant, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the affected member of the news media notice of the order or warrant as soon as it is determined that such notice will no longer pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. In any event, such notice shall occur within 45 days of the government’s receipt of any return made pursuant to the subpoena, court order, or warrant, except that the Attorney General may authorize delay of notice for an additional 45 days if he or she determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. No further delays may be sought beyond the 90-day period.

(3) The United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Director of the Office of Public Affairs and to the Director of the Criminal Division’s Office of Enforcement Operations a copy of any notice to be provided to a member of the news media whose communications records or business records were sought or obtained at least 10 business days before such notice is provided to the affected member of the news media, and immediately after such notice is, in fact, provided to the affected member of the news media.

(f) *Questioning members of the news media about, arresting members of the news media for, or charging members of the news media with, criminal conduct they are suspected of having committed in the course of, or arising out of, the coverage or investigation of news, or while engaged in the performance of duties undertaken as members of the news media.*

(1) No member of the Department shall

subject a member of the news media to questioning as to any offense that he or she is suspected of having committed in the course of, or arising out of, the coverage or investigation of news, or while engaged in the performance of duties undertaken as a member of the news media, without notice to the Director of the Office of Public Affairs and the express authorization of the Attorney General. The government need not view the member of the news media as a subject or target of an investigation, or have the intent to prosecute the member of the news media, to trigger the requirement that the Attorney General must authorize such questioning.

(2) No member of the Department shall seek a warrant for an arrest, or conduct an arrest, of a member of the news media for any offense that he or she is suspected of having committed in the course of, or arising out of, the coverage or investigation of news, or while engaged in the performance of duties undertaken as a member of the news media, without notice to the Director of the Office of Public Affairs and the express authorization of the Attorney General.

(3) No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense that he or she is suspected of having committed in the course of, or arising out of, the coverage or investigation of news, or while engaged in the performance of duties undertaken as a member of the news media, without notice to the Director of the Office of Public Affairs and the express authorization of the Attorney General.

(4) In requesting the Attorney General's authorization to question, to arrest or to seek an arrest warrant for, or to present information to a grand jury seeking an indictment or to file an information against, a member of the news media for an offense that he or she is suspected of having committed during the course of, or arising out of, the coverage or investigation of news, or while engaged in the performance of duties undertaken as a member of the news media, a member of the Department shall state all facts necessary for

a determination by the Attorney General.

(g) *Exigent circumstances.* (1) A Deputy Assistant Attorney General for the Criminal Division may authorize the use of a subpoena or court order, as described in paragraph (c) of this section, or the questioning, arrest, or charging of a member of the news media, as described in paragraph (f) of this section, if he or she determines that the exigent use of such law enforcement tool or technique is necessary to prevent or mitigate an act of terrorism; other acts that are reasonably likely to cause significant and articulable harm to national security; death; kidnapping; substantial bodily harm; conduct that constitutes a specified offense against a minor (for example, as those terms are defined in section 111 of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. 16911), or an attempt or conspiracy to commit such a criminal offense; or incapacitation or destruction of critical infrastructure (for example, as defined in section 1016(e) of the USA PATRIOT Act, 42 U.S.C. 5195c(e)).

(2) A Deputy Assistant Attorney General for the Criminal Division may authorize an application for a warrant, as described in paragraph (d) of this section, if there is reason to believe that the immediate seizure of the materials at issue is necessary to prevent the death of, or serious bodily injury to, a human being, as provided in 42 U.S.C. 2000aa(a)(2) and (b)(2).

(3) Within 10 business days of a Deputy Assistant Attorney General for the Criminal Division approving a request under paragraph (g) of this section, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Attorney General and to the Director of the Office of Public Affairs a statement containing the information that would have been given in requesting prior authorization.

(h) *Failure to comply with policy.* Failure to obtain the prior approval of the Attorney General, as required by this policy, may constitute grounds for an administrative reprimand or other appropriate disciplinary action.

(i) *General provision.* This policy is not intended to, and does not, create

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any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

[AG Order No. 3420-2014, 79 FR 10990, Feb. 27, 2014]

§ 50.12 Exchange of FBI identification records.

(a) The Federal Bureau of Investigation, hereinafter referred to as the FBI, is authorized to expend funds for the exchange of identification records with officials of federally chartered or insured banking institutions to promote or maintain the security of those institutions and, if authorized by state statute and approved by the Director of the FBI, acting on behalf of the Attorney General, with officials of state and local governments for purposes of employment and licensing, pursuant to section 201 of Public Law 92-544, 86 Stat. 1115. Also, pursuant to 15 U.S.C. 78q, 7 U.S.C. 21 (b)(4)(E), and 42 U.S.C. 2169, respectively, such records can be exchanged with certain segments of the securities industry, with registered futures associations, and with nuclear power plants. The records also may be exchanged in other instances as authorized by federal law.

(b) The FBI Director is authorized by 28 CFR 0.85(j) to approve procedures relating to the exchange of identification records. Under this authority, effective September 6, 1990, the FBI Criminal Justice Information Services (CJIS) Division has made all data on identification records available for such purposes. Records obtained under this authority may be used solely for the purpose requested and cannot be disseminated outside the receiving departments, related agencies, or other authorized entities. Officials at the governmental institutions and other entities authorized to submit fingerprints and receive FBI identification records under this authority must notify the individuals fingerprinted that the fingerprints will be used to check the criminal history records of the FBI. The officials making the determination of suitability for licensing or employment shall provide the applicants the opportunity to complete, or challenge

the accuracy of, the information contained in the FBI identification record. These officials also must advise the applicants that procedures for obtaining a change, correction, or updating of an FBI identification record are set forth in 28 CFR 16.34. Officials making such determinations should not deny the license or employment based on information in the record until the applicant has been afforded a reasonable time to correct or complete the record, or has declined to do so. A statement incorporating these use-and-challenge requirements will be placed on all records disseminated under this program. This policy is intended to ensure that all relevant criminal record information is made available to provide for the public safety and, further, to protect the interests of the prospective employee/licensee who may be affected by the information or lack of information in an identification record.

[Order No. 2258-99, 64 FR 52229, Sept. 28, 1999]

§ 50.14 Guidelines on employee selection procedures.

The guidelines set forth below are intended as a statement of policy of the Department of Justice and will be applied by the Department in exercising its responsibilities under Federal law relating to equal employment opportunity.

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

NOTE: These guidelines are issued jointly by four agencies. Separate official adoptions follow the guidelines in this part IV as follows: Civil Service Commission, Department of Justice, Equal Employment Opportunity Commission, Department of Labor.

For official citation see section 18 of these guidelines.

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